IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 16TH OCTOBER 2006 / 24TH ASWINA 1928

ITR.No. 150 to 153 of 1999()

AGAINST THE ORDER IN RA 225, 226,227 & 228/Coch/96 IN WTA.361 to 364/Coch/1991 of I.T.A.TRIBUNAL,COCHIN BENCH

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APPLICANT:

T.A. ABDUL KHADER, CHANGANASSERY.

BY ADV. SRI.JOHN RAMESH K.I.JOHN

RESPONDENT:

THE COMMISSIONER OF WEALTH TAX, TRIVANDRUM.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT

THESE TAX REFERENCES HAVING BEEN FINALLY HEARD ON 16/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.N.RAMACHANDRAN NAIR &
K.M.JOSEPH, JJ.

I.T.R. NOs. 150 to 153 OF 1999

Dated this the 16th day of October, 2006

JUDGMENT

Ramachandran Nair,J.

The common question referred to us by the Income-tax Appellate Tribunal, Cochin Bench, under Section 27(1) of the Wealth Tax Act arising from the order of the Tribunal in the Wealth Tax Appeals of the petitioner for the assessment years 1983-84 to 86-87 is the following:

> Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the penalty proceedings were valid in view of Section 42C inserted in the Wealth Tax Act?

2. Petitioner who did not file wealth tax returns for the above assessment years was served with separate notices under Section 18(2) of the Wealth Tax Act proposing to levy penalty under Section 18(1) of the said Act. Since petitioner did not respondent to notices, fresh notices were issued on 16.10.1989 against which petitioner filed replies stating that he could file returns only by 23.10.1987 on account of search in his business premises by the Income-tax Department. Even

though petitioner requested to drop the penalty proceedings no contention was raised that the notice proposing penalty was illegal or without jurisdiction. Even in the first appeal challenging the penalty order, no ground was raised against validity of the notice. However, for the first time, petitioner raised a contention before the tribunal that notice initiating penalty proceedings under Section 18(1) of the Act was invalid as the same did not specify the provision of the Act violation of which attracts penalty. Even though petitioner relied on the direct decision of this Court in N.N. SUBRAMANIA IYER V. UNION OF INDIA, (1974) 97 I.T.R. 228 wherein a learned single Judge of this Court held that penalty notice in printed form in which the ground on which penalty was sought to be levied was not indicated by striking out the other Sections and grounds was invalid, Tribunal upheld the validity of the notice by reference to Section42C of the Act. So far as the quantum of penalty is concerned, Tribunal granted some relief to the petitioner by way of reduction. However, since the Tribunal has upheld the validity of the penalty notice by reference to Section 42C of the Act, petitioner got the above question referred to this Court for our decision.

3. We have heard Sri. John Ramesh, counsel appearing for the

petitioner, and senior counsel Sri.P.K. R. Menon, appearing for the respondent.

4. Since the defective notice, which is the sole basis of reference case is not an annexure in the reference case before us, we requested counsel for the petitioner to produce a copy of the notice and he has produced original of the same before us. We find from the notice that it is in printed form and is one issued under Section 18(2) of the Act. The proposal in the ultimate portion of the notice is to levy penalty under Section 18(1) of the Act. Three situations are covered by the notice, which can obviously be alternative or cumulative. First one is failure to file return, second one is failure to comply with notice issued under Section 16 and the third one is for concealment of particulars of net wealth or deliberately furnishing inaccurate particulars. We find from the original notice produced in Court that two grounds were struck-off and the proposal in the notice is to levy penalty under Section 18(1) only for default in furnishing return. If the notice issued for other assessment years is of the same pattern then petitioner's contention based on the above referred decision of this Court that the ground of penalty is not made known to the petitioner by not striking out other grounds is factually incorrect, because the Officer in fact has

struck off other two grounds retaining the proposal of penalty only on the ground of failure to file return. However, it is seen from the notice that the Section under which return was not filed, namely, Section 14 (1), 14(2) of Section 17 was not made clear in the notice because none of the three Sections was struck-off in the notice.

5. Now the question to be considered is whether failure of the Officer to mention whether penalty proposed is for non-filing of return under Section 14(1) or 14(2) or Section 17 will invalidate penalty proceedings. While the case of the petitioner based on the above referred single Bench decision and Division Bench decision of this Court in P.N. SASIKUMAR V. C.I.T., (1988) 170 I.T.R. 80 is that even Section 42C cannot save the penalty proceedings, senior counsel for the respondent relied on the decision of the Andhra Pradesh High Court C.I.T. V. CHANDULAL, 152 I.T.R. 238 and contended that single Bench decision of this Court does not apply to this case and in any case it has to be overruled based on the decision of the Division Bench of the Andhra Pradesh High Court above referred. Alternatively he contended that the defect, if any, in the notice proposing penalty is so insignificant and it's validity is therefore protected by virtue of operation of Section 42C of the Act which came into force by

introduction of Taxation Amendment Act 1975 with effect from 1.10.1975. Since the Tribunal has upheld the penalty proceedings by reference to Section 42C and the question referred is also with reference to the Section, we extract hereinbelow Section 42C for easy reference.

> **42C. Return of wealth, etc., not to be invalid on certain grounds.** No return of wealth, assessment, notice, summons or other proceeding furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of wealth, assessment, notice, summons or other proceeding, if such return of wealth, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

The above Section is in substance same as Section 292B of the Income-tax Act, 1960. The purpose of the Section, as made clear from it, is that mistaken or defective actions or omissions should not invalidate proceedings initiated or completed which is in substantial compliance with statutory scheme. Therefore in order to uphold a defective proceeding, what has to be considered is whether the action taken in substance is in conformity with the intent and purpose of the Act.

Applying this test to the facts of this case, we find the notice issued under Section 18(2) of the Act was in conformity with the mandatory principle of natural justice provided in the statute. The question whether the action initiated is tenable is to be considered with reference to the follow-up action taken by the petitioner also which will disclose how he has understood the notice or the proposed action. Even though reply to the notice is not produced, the assessing officer while issuing penalty has stated that petitioner has explained the delay in filing the return as on account of search conducted by the Income-tax Department in his business premises. Therefore not only that the Officer has issued the notice as one proposing penalty for failure to file return, but the assessee has also understood it in the same manner and has replied answering the allegation on merits. In this case, petitioner himself admits that he has not filed return under Section 14(1) but has filed a belated return against a notice under Section 17 of the Act. Therefore it is obvious that penalty proposed is for not filing the return in terms of requirement of Section 14(1) of the Act. The position would have been different had the petitioner filed return under Section 14(1) and was called upon to file another return by notice issued under Section 17 of the Act which does not arise in this case. In this context,

we are in complete agreement with the Division Bench decision of the Andhra Pradesh High Court wherein they have stated that mere failure to strike-off in-appropriate portion in a notice will not render the notice automatically invalid, unless in a further enquiry it is shown that by reason of the notice not properly conveying the gist of the offence to the assessee, prejudice is caused to him. We are of the same view as that of the Andhra Pradesh High Court that as a general proposition of law, it cannot be said that a notice is rendered invalid just because in-appropriate portions in the notice are not struck-off. In other words, the grievance of the party on account of failure of the Officer to strike off unnecessary portion of the notice will have to be tested on the facts of every case while deciding it's validity. In this case, we have already found on facts that the officer has struck off portions in the notice pertaining to penalty for non-compliance with statutory notice and for concealment of particulars of return. We are in agreement with the order of the Tribunal that failure to strike off Section 14(2) or Section 17 from the notice in this case does not affect the validity of penalty notice issued under Section 18(2) of the Act for levying penalty for non-filing of return under Section 14(1) of the Act. We therefore answer the question referred in the affirmative, that is, in favour of the

revenue and against the assessee.

A copy of this judgment under the seal of the High Court and signature of the Registrar, shall be forwarded to the Income-tax Appellate Tribunal, Cochin Bench.

(C.N.RAMACHANDRAN NAIR)
Judge

(K.M.JOSEPH)
Judge